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IN THE

Supreme Court of the United States

THE BLACK & DECKER DISABILITY PLAN,
Petitioner,

v.

KENNETH L. NORD,
Respondent.

On Writ of Certiorari to the United States Court Of Appeals for the Ninth Circuit

BRIEF OF THE AMERICAN BENEFITS COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF THE AMERICAN BENEFITS COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

This brief is submitted on behalf of the American Benefits Council as *amicus curiae* in support of petitioner, with the written consent of the parties.[1]

INTEREST OF AMICUS CURIAE

The American Benefits Council ("ABC"), is a broad-based nonprofit trade association founded to protect and foster the growth of this Nation's effective and important privately sponsored employee benefit plans. The members of ABC include both small and large employer sponsors of employee benefit plans, as well as plan support organizations,

[1] Letters of consent have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus* or its counsel made a monetary contribution to this brief.

such as consulting and actuarial firms, investment firms, banks, insurers and other professional benefit organizations. Collectively, its more than 250 members sponsor, administer or advise plans covering more than 100 million plan participants. ABC has filed *amicus* briefs in other cases before this Court raising issues of concern to employers, insurers, and employee benefit plan support entities. *See, e.g., Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355 (2002); *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002).

SUMMARY OF ARGUMENT

The decisions of the Ninth Circuit applying the "treating physician rule" to review of private disability benefit plan eligibility determinations cannot be squared with the principles of discretion and deference that properly govern judicial review of such determinations.

I. The choice whether to provide a disability plan is entirely up the employer, as is the decision whether to confer discretion on the plan administrator to make eligibility determinations. If the employer decides to confer such discretion, then a court must respect that choice and give wide deference to the administrator's eligibility decision, setting it aside only if it reflects an abuse of the administrator's discretion. This is true even where the administrator is operating under a potential conflict of interest: a court should apply less deferential review in that circumstance only where the claimant produces specific evidence, beyond the mere fact of the potential conflict, establishing that the administrator's judgment was *actually influenced* by an improper motive.

II. The "treating physician rule" conflicts with the foregoing principles. As applied in recent Ninth Circuit cases, the rule requires a plan administrator to accept as controlling the opinion of an employee's treating physician that the employee is "disabled" within the meaning of the plan, unless the administrator can point to specific facts showing that the

opinion is not reliable. The rule ignores the fact that a "disability" determination often involves much more than just a purely medical judgment – it involves the application of what are often subjective medical issues to disability plan language and flexible job requirements. Treating physicians typically have no experience or expertise in interpreting employee benefit plans or in evaluating how job requirements may be altered to keep an employee with a medical problem on the job. Even to the extent purely medical judgments are involved, an administrator does not abuse its discretion where, as here, it chooses to rely on the medical judgment of an independent consulting physician rather than on the opinion of the employee's own physician. Treating physicians are not necessarily more "objective" than consulting physicians; indeed, they have a strong duty of loyalty to their patients, and no duty whatsoever to employers and other plan beneficiaries. More important, disability determinations are often highly subjective, and the fact that two doctors disagree does not mean that either's opinion is unreasonable. And choosing between two reasonable opinions is the essence of discretion.

Nor can the treating physician rule be justified as a device for determining whether an administrator operating under a potential conflict of interest was actually influenced by the improper, potentially conflicting interest. The mere fact that an administrator decides not to follow the treating physician's opinion does not amount to the kind of specific evidence of improper influence that should be required before a court applies less deferential review to the administrator's judgment. An administrator's decision to follow the consulting physician rather than the treating physician is not specific evidence of improper influence – it is only evidence that the administrator, in the exercise of its discretion, disagreed with the treating physician. There is no basis for an inference of bad motive from such disagreement: treating physicians know comparatively little or nothing about job requirements,

and treating physicians are subject to their own potentially conflicting interests. Even more important, ERISA and this Court's opinions recognize that most fiduciaries live up to their fiduciary obligations, until it is proved otherwise. Further, Department of Labor regulations, recently revised and strengthened, provide additional procedural safeguards for plan participants, including safeguards specifically directed toward ensuring that plan administrators have a sound, impartial basis for their disability determinations. The treating physician rule supplants all of that with a presumption of bad faith, grounded on the deeply flawed premise that a treating physician opinion is typically so valuable that only an improperly influenced administrator would reject it in the absence of evidence that the opinion is unreliable. That view vastly overstates the value of such opinions and greatly understates the professionalism and responsibility of the typical plan administrator.

ARGUMENT

The question in this case is whether the plan administrator or named fiduciary of an ERISA-governed employee disability benefits plan must accord deference to the opinion of an employee's own doctor that the employee is "disabled" within the meaning of that term under the plan – even where the plan confers discretion on the plan administrator to decide whether an employee qualifies as "disabled." The answer is no.

The "treating physician rule" requires a plan administrator to give controlling weight to the conclusion of the employee's "treating physician" that the employee is "disabled" under the plan, unless the plan administrator can identify "specific, legitimate reasons" for rejecting the treating physician's conclusion. Pet. App. 13. It is not enough under the rule for the administrator (even when reviewing the initial denial of a claim by an independent entity with no financial interest in the claim), to rely upon the conclusions of a consulting physician retained by the plan, *id.* at 14, or on the administrator's own experience and judgment about the demands of the employee's position. Rather, the administrator must point to substantial evidence tending to prove that the treating physician's opinion was "unreliable and [the independent physician's] more reliable," or that the treating physician "considered inappropriate factors" in deciding the employee was disabled, or that the physician "lacked the requisite medical expertise" to reach such a decision. *Id.* at 13-14.

There is no context in the administration of any ERISA-governed disability plan in which it is appropriate for a court to impose that kind of burden on a plan administrator. Doing so runs afoul of two principles fundamental to the administration of ERISA-governed disability plans. First, ERISA does not compel employers to provide any disability benefits at all. The decision whether to provide such benefits, and if so, what benefits to provide, rests entirely with the employer. As part of that decision, the employer has complete freedom to establish the substantive requirements for receiving disability benefits under the plan – to define what constitutes a qualified "disability," for example. Second, and relatedly, if an employer decides to provide a disability benefit plan, it may vest in the plan administrator complete discretion to determine whether a given employee satisfies the plan's requirements for benefits, including whether the employee qualifies as "disabled" within the meaning of the plan. If a plan does confer such discretion on the administrator – as does the plan at issue here – a court reviewing an eligibility determination as part of a suit for benefits under ERISA must accord wide deference to the administrator's judgment, reversing its decision only if the court finds an actual abuse of discretion by the administrator.

The treating physician rule cannot be reconciled with these essential principles of employer choice, discretion and deference. To say that a plan administrator *must* defer to the

treating physician is to say, by definition, that the administrator *cannot* exercise discretion. It is fundamentally to shift authority to administer the plan away from the plan administrator, and over to both the treating physician and the reviewing court. Nothing in ERISA, its governing regulations, or this Court's precedents, supports that result – and much contradicts it. The judgment should be reversed.

I. BASIC ERISA AND TRUST LAW PRINCIPLES COMPEL WIDE JUDICIAL DEFERENCE TO A PLAN ADMINISTRATOR'S EXERCISE OF DISCRETION IN DETERMINING BENEFIT ELIGIBILITY, EVEN WHERE THERE IS A POTENTIAL CONFLICT OF INTEREST

ERISA neither compels employers to establish disability benefit plans, nor restricts the freedom of employers to define the disability benefits they choose to provide. *See Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996); *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 71, 78 (1995). ERISA's safeguards are essentially contractual and procedural in nature: where an employer decides to establish a disability benefit plan, ERISA "simply requires [the] plan[s] to afford a beneficiary some mechanism for internal review of a benefit denial, 29 U.S.C. § 1133(2), and provides a right to a subsequent judicial forum for a claim to recover benefits, § 1132(a)." *Rush Prudential HMO, Inc. v. Moran*, 122 S. Ct. 2151, 2169 (2002).

In accordance with the employer's discretion to define the disability benefits available under a plan, an employee's entitlement to benefits is controlled by the terms of the employer's plan. *See Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 511 (1981). At the same time, the employer may decide to confer discretion on the plan administrator[2] to "de-

[2] ERISA requires that all plans be administered by a "named fiduciary," 29 U.S.C. § 1102(a)(1), typically referred to as the "plan administrator" (the Black & Decker Disability Plan labels the position "Plan Manager"). Named fiduciaries other than the plan administrator may also be designated to administer claims. *Id.* References in this brief to the "plan administrator" include such named fiduciaries.

termine eligibility for benefits or to construe the terms of the plan." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989).

When a benefit plan includes such a provision, the court's power to review a plan administrator's discretionary eligibility determination is highly circumscribed. *Id.* As the Court explained in *Firestone*, under principles of trust law that guide the application of ERISA in this area, where "discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court except to prevent an abuse by the trustee of his discretion." *Id.* at 111 (quoting Restatement (Second) of Trusts § 187 (1959) ("Restatement")). A court "*will not interfere to control* [trustees] in the exercise of a discretion vested in them by the instrument under which they act." *Id.* at 111 (quoting *Nichols v. Eaton*, 91 U.S. 716, 724-25 (1875) (emphasis altered)). In the law of trusts, "[t]he cases are numerous in which it has been held that where discretion is conferred upon the trustee with respect to the exercise of a power the court will not interfere with him in his exercise or failure to exercise the power so long as he is not guilty of an abuse of discretion." III Scott & Fratcher, The Law of Trusts ("Scott on Trusts") § 187 (4th ed. 1988).

Although based soundly in trust law, the principle of deference to the discretionary decisions of the plan administrator also fits hand-in-glove with Congress's determination to leave employers free to establish the substantive terms of the welfare benefit plans they choose to provide. An employer could of course decide that employees are better off if any individual claimant who is denied benefits can bring a judicial action in which the court will review the denial *de novo*

and decide for itself whether the claimant should receive the benefit sought in that case. But in such a case the court would evaluate just the merits of the individual claim before the court. The court would have little basis for considering the overall, and often subjective, long-term interests of the plan and its other beneficiaries. Nor would the court have the expertise to do so. The judicial ken is to decide cases-and-controversies – not to run employee welfare plans.

Given that obvious drawback (among others) of leaving the administration of disability plans to the federal courts, employers are much more likely to decide that it is better for all concerned if the plan confers the discretion to make individual eligibility decisions on an expert professional with authority to administer the overall plan, and a fiduciary responsibility to do so in the best interests of the plan and all its participants. If an employer decides to confer such discretion on the plan administrator, courts must respect that plan design decision as much as they must respect any other. Accordingly, when an administrator makes an eligibility determination, a court adjudicating a challenge to that determination must defer to the exercise of the administrator's discretion. *See Berry v. Ciba-Geigy Corp.*, 761 F.2d 1003, 1006 (4th Cir. 1985) (deferential review "exists to ensure that administrative responsibility rests with those whose experience is daily and continuous, not with judges whose exposure is episodic and occasional").[3]

The limited role left for a court in such circumstances is to determine whether the administrator abused its discretion. *Firestone*, 489 U.S. at 115; Restatement § 187; III Scott on Trusts § 187. As the lower courts have applied that standard of review, the administrator's eligibility decision will be up-

[3] *Amicus* ABC can attest that since *Firestone* made clear 14 years ago that a court must give deference when the plan confers discretion on the plan administrator, numerous employers and plan sponsors have added such provisions to their plans in reliance on *Firestone*.

held (absent a conflict of interest, *see infra* note 5) so long as it is supported by "substantial evidence." *See Fletcher-Merritt v. NorAm Energy Corp.*, 250 F.3d 1174, 1179 (8th Cir. 2001); *Meditrust Fin. Servs. Corp. v. Sterling Chemical, Inc.*, 168 F.3d 211, 215 (5th Cir. 1999); *Miller v. United Welfare Fund*, 72 F.3d 1066, 1071 (2d Cir. 1995); *Abnathya v. Hoffman-LaRoche, Inc.*, 2 F.3d 40, 45 (3d Cir. 1993); *Sandoval v. Aetna Life & Cas. Ins. Co.*, 967 F.2d 377, 382 (10th Cir. 1992). As in the administrative law context from which the standard is familiar, "substantial evidence" means only enough evidence that a "reasonable person could have reached the same decision as the plan administrator." *Fletcher-Merritt*, 250 F.3d at 1180; *see Miller*, 72 F.3d at 1072; *Sandoval*, 967 F.2d at 382; *cf. NLRB v. Columbian Enameling*, 306 U.S. 292, 300 (1939); *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). It requires more than a mere scintilla of evidence, but less than a preponderance. *See Meditrust*, 168 F.3d at 215; *Miller*, 72 F.3d at 1072; *Sandoval*, 967 F.2d at 382; *cf. Multimax, Inc. v. FAA*, 231 F.3d 882, 887 (D.C. 2000); *New Valley Corp. v. Gilliam*, 192 F.3d 150, 154 (D.C. 1999).[4]

This Court's explanation of the virtue of the deferential "substantial evidence" standard in reviewing administrative agency decisions could just have easily been summarizing the importance of deferring to the discretionary eligibility decision of an ERISA plan administrator:

> [The "substantial evidence" standard] frees the reviewing courts of the time-consuming and difficult

[4] The "substantial evidence" standard is the same as the standard applied to review of jury verdicts, *see Columbian Enameling*, 306 U.S. at 300; hence, it is much more deferential than the "clearly erroneous" review afforded judicial factfinders. *See* Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 Harv. L. Rev. 70, 88-89 (1944); Pierce, Administrative Law Treatise § 11.1, at 768-69 (4th ed. 2002).

> task of weighing the evidence, it gives proper respect to the expertise of the [administrator] and it helps promote the uniform application of the [plan]. These policies are particularly important when a court is asked to review an [administrator's discretionary eligibility determination]. In this area [administrator] determinations frequently rest on a complex and hard-to-review mix of considerations. By giving the [administrator] discretionary power to [make eligibility decisions], [the employer] places a premium upon [the administrator's] expertise, and, for the sake of uniformity, it is usually better to minimize the opportunity for reviewing courts to substitute their discretion for that of the [administrator].

Consolo v. Federal Maritime Comm'n, 383 U.S. 607, 620-21 (1966).

Finally, it bears noting that this highly deferential standard should not become less deferential merely because the plan administrator is operating under a potential conflict of interest. This Court stated in *Firestone* that "if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a 'facto[r] in determining whether there is an abuse of discretion.'" 489 U.S. at 115 (quoting Restatement § 187 comment d). Ever since, the lower courts have been in disarray over how the existence of a conflict "weighs" in the review of a discretionary eligibility determination.[5] Perhaps

[5] One court of appeals says that the mere existence of a potential conflict shifts the burden to the plan administrator to show that his decision was untainted by the conflict. *See Brown v. Blue Cross & Blue Shield, Inc.*, 898 F.2d 1556, 1566-68 (11th Cir. 1990). Other courts have adopted a "sliding scale" approach, under which the degree of deference turns on the extent of the potential conflict – the greater the potential conflict, the more closely the court will scrutinize the plan administrator's exercise of discretion. *See, e.g., Pitman v. Blue Cross*, 217 F.3d 1291, 1295 (10th Cir. 2000); *Pinto v. Reliance Std. Life Ins. Co.*, 214 F.3d 377, 378 (3d Cir. 2000); *Vega v. National Life Ins. Serv., Inc.*, 188 F.3d 287, 297 (5th Cir. 1999) (en banc). Still other courts hold that fully deferential, abuse-of-discretion review still obtains, unless and until the claimant produces "material, probative evidence, *beyond the mere fact of the apparent conflict*, tending to show that the fiduciary's self-interest caused a breach of the administrator's fiduciary obligations to the beneficiary." *Atwood v. Newmont Gold Co.*, 45 F.3d 1317, 1323 (9th Cir. 1995) (emphasis added). If, but only if, the claimant does come forward with "further evidence" in the form of "specific facts" showing that the administrator actually acted on the basis of the potentially conflicting interest, the burden shifts to the administrator to disprove that inference. *See id.* at 1322-23; *see also Clapp v. Citibank N.A. Disability Plan*, 262 F.3d 820, 827 (8th Cir. 2001) (court gives less deferential "sliding scale" review only if claimant produces "material, probative evidence" that a "palpable conflict" was actually connected to administrator's decision so as to "cause[] serious breach" of fiduciary obligation). Two other circuits follow the same approach, but add that the claimant's burden is more than just one of production – the claimant at all times bears "the burden of proving that the conflict of interest affected the administrator's decision." *Sullivan v. LTV Aerospace & Defense Co.*, 82 F.3d 1251, 1259 (2d Cir. 1996); *see Doyle v. Paul Revere Life Ins. Co.*, 144 F.3d 181, 184 (1st Cir. 1998).

cognizant of that confusion, this Court itself recently raised the question of "just how deferential the review [of an eligibility determination] can be when the judicial eye is peeled for conflict of interest." *Rush Prudential*, 122 S. Ct. at 2169 n.15.

The Court did not try to grapple with that question, but the answer turns out to be quite clear: the very trust principles relied upon in *Firestone* hold that a trustee who is operating under a conflict of interest abuses its discretion only when the evidence establishes that the trustee was actually motivated by the conflicting interest. As the Restatement explains:

> The court will control the trustee in the exercise of a power . . . where he acts from a motive other than to further the purposes of the trust. Thus, if the trustee in exercising or failing to exercise a power does so

> . . . to further some interest of his own or of a person other than the beneficiary, the court will interpose. *Although ordinarily the court will not inquire into the motives of the trustee, yet if it is shown that his motives were improper or that he could not have acted from a proper motive, the court will interpose.*

Restatement § 187 comment g (emphasis added). That a trustee is operating under a conflict is only a fact "to be considered" in determining whether the trustee was actually motivated by the improper, conflicting interest. *Id.* In other words, basic trust principles support the general approach of those circuits holding that the review of a plan administrator's discretionary eligibility determination remains fully deferential, even when the judicial eye spots a conflict of interest, unless and until the claimant produces specific evidence (beyond the conflict itself) establishing that the conflict actually caused the administrator to act contrary to the interests of the plan beneficiaries. *See supra* note 5.[6]

Although the Ninth Circuit has adopted a version of that approach, *see Atwood*, *supra*, 45 F.3d at 1323, it has been basically nullified where treating physician opinions are involved. As we show in the next section, the court's adoption of the treating physician rule eviscerates the twin principles of discretion and deference that apply to judicial review of ERISA disability benefit plan eligibility determinations, even

[6] Whether the burden is one of proof or of production is not answered by trust law principles, but by settled rules of pleading: shifting "the burden of proof to the defendants is contrary to the traditional burden of proof in a civil case." *Sullivan*, 82 F.3d at 1259; *cf. St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993) (burden of persuasion under Federal Rules of Evidence always rests with plaintiff). Accordingly, the burden at all times should be on the claimant to prove that a conflict exists and that the conflict actually affected the decision. *See Sullivan*, 82 F.3d at 1259; *Doyle*, 144 F.3d at 184.

where the administrator is operating under a potential conflict of interest.

II. THE TREATING PHYSICIAN RULE CONFLICTS WITH THE DEFERENCE COURTS OWE TO A PLAN ADMINSTRATOR'S DISCRETIONARY ELIGIBILITY DETERMINATIONS

The Ninth Circuit has thus far applied the treating physician rule only in the context of a plan administrator operating under a potential conflict of interest. The court uses the rule as an evidentiary device for determining whether a potentially conflicting interest in fact provided the plan administrator's true motivation. According to the Ninth Circuit, where a claimant shows that a plan administrator subject to a potential conflict has "reject[ed] the opinions of the [claimant's] treating physicians," the claimant has produced "material, probative evidence" that the "apparent conflict of interest has ripened into an actual, serious conflict, thereby permitting the court to engage in de novo review." *Regula v. Delta Family-Care Survivorship Plan*, 266 F.3d 1130, 1147 (9th Cir. 2001), *petition for cert. pending*, No. 01-1840. To permissibly reject a treating physician's opinion under this rule, a potentially conflicted administrator must rely on more than the conclusion of an independent consulting physician that the employee is not disabled, and more than the administrator's own investigation and knowledge of the employee's job position requirements. Rather, the administrator must point to additional evidence specifically *dis*proving the accuracy or reliability of the treating physician's conclusions. Pet. App. 13-14.

Although the Ninth Circuit's specific applications of the rule have to date been only in cases involving potential conflicts of interest, the court's earlier opinion in *Regula* contained a more extensive discussion of why a court should apply the treating physician rule even where there is no conflict of interest issue and review is only for abuse of discre-

tion. *See* 266 F.3d at 1139 ("we see no reason why the treating physician rule should not be used under ERISA in order to test the reasonableness of the administrator's positions"); *id.* at 1140-41 ("we do not believe that the treating physician rule is inconsistent with the broad discretion accorded plan administrators under *Firestone*"); *see generally id.* at 1139-44. Nor is the Question Presented in the petition for certiorari in this case explicitly limited to the application of the treating physician rule where potential conflicts are involved. *See* Pet. i. Accordingly, we begin by explaining why the treating physician rule is inconsistent with the wide deference a court generally owes to an administrator's discretionary eligibility determinations. We then explain why it also should not be applied to eliminate the deference a court would otherwise owe even to an administrator operating under a potential conflict.

A. The Treating Physician Rule Improperly Restricts Both The Administrator's Discretion And The Deference Courts Owe That Discretion

As articulated by the Ninth Circuit in its recent cases, the treating physician rule requires a plan administrator evaluating a claim for disability benefits to give deference to the opinion of the treating physician that the employee is "disabled" within the meaning of the plan. *Regula*, 266 F.3d at 1139. Such deference is "not absolute," *id.* at 1140, but it is considerable. The administrator may reject the treating physician's opinion only if the administrator can identify "specific, legitimate reasons for doing so." *Id.* The contrary opinion of an independent consulting physician will not suffice, in and of itself, to rebut the treating physician's view; the administrator must point to "other evidence in the record." *Id.* The consulting physician's opinion, together with the "other evidence," must tend to show that the treating physician's opinion is not reliable. Pet. App. 13-14. That

rule cannot be reconciled with fundamental principles governing review for abuse of discretion.

1. To begin with, even indulging the Ninth Circuit's mistaken assumption that "eligibility for [disability] benefits turns almost entirely on medical professionals' opinions as to the claimants' impairments," *Regula*, 266 F.3d at 1141, there is no question but that a plan administrator typically would be entitled to rely entirely on the opinion of an independent consulting physician. A plan administrator's discretionary eligibility determination need be supported only by "substantial evidence" – i.e., enough evidence that "a reasonable person could have reached the same decision as the plan administrator." *Fletcher-Merrit*, 250 F.3d at 1180; *see supra* at 8-10. So long as the consulting physician is not shown to be unreliable, incompetent, or actually biased, it would be the rare case in which no reasonable person could believe that the consulting physician's opinion was correct.

Of course, the opinion of the consulting physician must be viewed as part of the record as a whole, which would include the opinions of the treating physicians. *Cf. Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) (substantial evidence determined on basis of record as whole). But unless the claimant can show that the consulting physician's opinion does not reflect a reasoned and reasonable medical judgment, the mere fact that another physician disagrees would not undermine the reasonableness of the administrator's decision to rely on one opinion rather than the other. The medical judgment involved in a disability determination is often highly subjective: how much pain does the employee suffer? how long can she sit or stand? how many breaks will help? what kinds of changes of position would help? how much can she lift? how often? how much would medication help? Given the subjective nature of such issues, it is quite possible to have two medical judgments, both of which are reasonable. And choosing between two reason-

able options is the essence of discretionary judgment. *See Fletcher-Merrit*, 250 F.3d at 1188 (where a "plan administrator offer[ed] a reasonable explanation for its decision, it should not be disturbed even if another reasonable, but different, interpretation may be made" (internal quotation marks omitted); *cf. Consolo*, *supra*, 383 U.S. at 619 ("the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence").

2. But the plan administrator's decision is, in truth, about more than just which of two or more reasonable doctor's opinions to rely upon. Contrary to the key premise underlying the Ninth Circuit's adoption of the treating physician rule, the decision whether an employee qualifies for disability benefits frequently rests upon just the kind of "complex and hard-to-review mix of considerations" that justify wide deference to the administrator's judgment. *Consolo*, 383 U.S. at 621.

These considerations begin with the language of the plan establishing, *inter alia*, what kind of "disability" an employee must have to receive benefits. In this case, for instance, the Black & Decker Disability Plan defines "disabled," in pertinent part, as "the complete inability (whether physical and/or mental) of a Participant to engage in his regular occupation with the Employer." Pet. App. 3 n.2. Thus, to decide whether a given employee is entitled to benefits under the plan, the plan administrator must evaluate not only "the claimant['s] impairments," *Regula*, 266 F.3d at 1141, but also how those impairments affect his ability to "engage in his regular occupation" with Black & Decker. That decision obviously requires knowledge, perhaps even intimate knowledge, of the employee's job, what it requires, and how it might be changed to accommodate the employee's medical needs. The latter consideration is especially important. In light of the Americans with Disability

Act ("ADA"), employers now have a legal incentive, even the duty, to make reasonable accommodations in an employee's job environment, tasks, schedule, and the like, so as to enable the employee to continue to work despite a disability. 42 U.S.C. §§ 12111(9) & 12112(a)&(b)(5). An employee seeking disability benefits is not obliged to demand a reasonable accommodation under the ADA, to be sure, but neither is an employer barred by ERISA from trying to make reasonable accommodations to a disabled employee to keep him on the job.

In this case the plan administrator *did* engage in exactly the kind of analysis of flexible job requirements one would expect a plan administrator to engage in. It is undisputed that the administrator "discussed" with a Black & Decker human resources professional "the specific duties that were required of [respondent] in his position as a Material Planner and his freedom of movement in that position." Pet. App. 92-93. The administrator determined that respondent "was able to sit or stand at will," and that "help was available" if he needed assistance "lifting any items." *Id.* at 93. The administrator's ultimate denial of benefits was based in part specifically on the administrator's assessment of respondent's "particular job responsibilities." *Id.*

There is of course no evidence in the record that any of respondent's treating physicians engaged in that kind of evaluation of respondent's job requirements. Nor is there any plausible reason any treating physician ever would or could do such an evaluation. Nor is there any reason to think that, if one ever tried, her opinion as a medical doctor about how an employer should alter its job requirements would be of genuine probative value. The need to conduct such assessments is precisely why plan administrators exist, and why employers choose to give them the responsibility and discretion to determine whether a given employee is eligible

for disability benefits. It is also why courts give wide deference to the exercise of that discretion.

3. Finally, to justify applying the treating physician rule when review is for abuse of discretion, a court must presume that the treating physician is so overwhelming likely to have a "better" or "more accurate" opinion about her patient's disability status that no reasonable person would decline to rely on the opinion absent "specific, legitimate reasons" not to. That presumption is unsound. First, as we have just seen, the treating physician is not likely to have much if any knowledge or facility with the requirements of her patient's job. As this case illustrates, she can at best base a determination that her patient has a "complete inability" to engage in her "regular occupation" on a static understanding of certain numerically stated criteria regarding that "regular occupation."

Second, treating physicians are not immune from the kind of conflict that the Ninth Circuit suggested would tend to affect consulting physicians and administrators. The treating physician's sole duty is to her patient; she has no legal duty whatsoever to her patient's employer or other plan beneficiaries. That she would be inclined to support her patient's position in respect to any subjective medical judgments is only to be expected. *See* 63 Fed. Reg. 48390, 48392 (Sept. 9, 1998) ("it is the Department [of Labor]'s view that an individual's attending physician would generally be treated as a representative of the claimant"); *cf. Peabody Coal Co. v. McCandless*, 255 F.3d 465, 469 (7th Cir. 2001) ("Treating physicians often succumb to the temptation to accommodate their patients (and their survivors) at the expense of third parties such as insurers, which implies attaching a discount rather than a preference to their views."); *Stephens v. Heckler*, 755 F.2d 284, 289 (7th Cir. 1985) ("The patient's regular physician may want to do a favor for a friend and client, and so the treating physician may too

quickly find disability."). In view of a treating physician's comparative lack of expertise and potential bias toward her patient, there is no justification for forcing administrators to defer to treating physicians' opinions over other valid evidentiary indicators of a claimant's entitlement to benefits.

4. In sum, the Ninth Circuit's view that the treating physician rule "can assist courts to enforce to accuracy of disability determinations under ERISA," *Regula*, 266 F.3d at 1141, misses the point at every level. The role of the court is *not* to "enforce" the supposed "accuracy" of an administrator's discretionary judgment – it is only to ensure that the administrator has more than a mere scintilla of evidence to support its discretionary decision. Nor does forcing administrators to defer to treating physicians' opinions improve the "accuracy" of benefit determinations in any platonic sense – it only increases the number of claimants who will be deemed qualified under a plan. That result may well be contrary to the best interests of the plan and its other beneficiaries, which is why eligibility determinations are best made not by the application of an unsound presumption, but through the exercise of a fiduciary's discretion.

B. The Treating Physician Rule Should Not Be Invoked As Basis For Discarding Deferential Review Where The Plan Administrator Acts Under A Potential Conflict Of Interest

The treating physician rule makes no more sense as an evidentiary device for uncovering a conflict of interest than it does as a general restriction on the administrator's discretion. The Ninth Circuit held in this case that rejection of the treating physician's interpretation of "disability" proves that the plan administrator was actually influenced by an improper, conflicting interest, thereby warranting *de novo* review. That approach both overestimates the value of the treating physician's opinion and underestimates the likelihood that plan

administrators will act impartially despite potentially conflicting interests.

1. As an initial matter, we believe the Ninth Circuit's general approach to evaluating a potential conflict of interest while simultaneously deferring to the judgment of the potentially conflicted administrator is essentially sound. Even where an administrator *might* be influenced by an improper motive because of the existence of potentially conflicting interests, the Ninth Circuit applies fully deferential review to the administrator's judgment, unless and until the claimant produces "specific facts," beyond the potential conflict itself, demonstrating that the judgment was *actually* influenced by an improper motive. *See Atwood*, *supra*, 45 F.3d at 1322-23; *accord Clapp v. Citibank N.A. Disability Plan*, 262 F.3d 820, 827 (8th Cir. 2001). That approach coheres with the basic trust law analysis of potential conflicts of interest, and resolves practical concerns that courts cannot apply meaningfully deferential review while at the same time assessing the possibility of conflict. *See supra* at 11-12.

Importantly, this approach also recognizes that potential conflicts of interest do not always, or even often, result in decisions that are improperly motivated. ERISA itself reflects the same premise. The statute "provides specifically that employers may appoint their own officers to administer ERISA plans even if the company is a 'party in interest.' 29 U.S.C. § 1108(c)(3)." *Chalmers v. Quaker Oats Co.*, 61 F.3d 1340, 1344 (7th Cir. 1995); *see Pegram v. Herdrich*, 530 U.S. 211, 225 (2000) ("Under ERISA . . . a fiduciary may have financial interests adverse to beneficiaries.") When an employer appoints its own officer or employee to serve as plan administrator, the potential conflict between the employee's incentive to maximize his employer's profits and his responsibilities to plan beneficiaries as administrator is mitigated by ERISA's requirement that the plan administrator discharge his duty as solely in the interest of plan beneficiaries. *See* 29 U.S.C. § 1104(a). This Court has explicitly recognized the efficacy of fiduciary-type professional obligations in tempering conflicting financial incentives in the ERISA context. *See Pegram*, 530 U.S. at 218-19.

In addition, the Department of Labor, pursuant to its regulatory authority to ensure that the claims review process is "full and fair," has issued numerous regulations further protecting claimants from the potentially conflicting interests of plan fiduciaries. The regulations require plans to include "administrative process and safeguards designed to ensure and to verify that benefit claims determinations are made in accordance with governing plan documents and that, where appropriate, the plan provisions have been applied consistently with respect to similarly situated claimants." 29 C.F.R. § 2560.503-1(b)(5). The regulations assure claimants the right to provide and obtain information, the right to representation in the review process, and the right to an internal appeal. *Id.* §§ 2560.503-1(h)(2)(ii-iv)&(h)(3)(i-ii)&(h)(4). And the Department has specifically provided that, in the internal appeal from a denial of disability benefits that is "based in whole or in part on a medical judgment," the plan administrator must "consult with a health care professional who has the appropriate training and experience in the field of medicine involved in the medical judgment." *Id.* § 2560.503-1(h)(3). These procedural protections help ensure that claimants receive a fair claim determination, the Department believes, without compromising the "purely voluntary nature" of benefit plan systems. 65 Fed. Reg. 70246, 70246 (Nov. 21, 2000).

Yet another factor mitigating possible conflicts is the employer's longer-term economic interest. Lower courts repeatedly have recognized that it does not make good economic sense for an employer to appoint administrators who "make it a practice of resisting claims for benefits." *Chalmers*, 61 F.3d at 1344. The purpose of a disability

benefit plan "is to please employees, not to result in the employer's bad reputation," *Doyle v. Paul Revere Life Ins. Co.*, 144 F.3d 181, 184 (1st Cir. 1998), and in the long run a practice of denying claims would only "dampen the loyalties of current employees while hindering attempts to attract new talent," *Chalmers*, 61 F.3d at 1344; *see Nazay v. Miller*, 949 F.3d 1323, 1335 (3d Cir. 1991) (employers have "incentives to avoid the loss of morale and higher wage demands that could result from denials of benefits"); *accord Gallo v. Amoco Corp.*, 102 F.3d 918, 921 (7th Cir. 1996).

All of the foregoing supports the conclusion that where "a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest," *Firestone*, 489 U.S. at 115, the proper way to "weigh" that conflict in determining whether there is an abuse of discretion is to require specific evidence, beyond the mere fact of the potential conflict, showing that the conflict *actually affected* the administrator's exercise of discretion, *see Clapp*, 262 F.3d at 827; *Atwood*, 45 F.3d at 1323. Specific evidence demonstrating such improper influence establishes an abuse of discretion, and it is at that point – but only at that point – that less deferential review is appropriate.

2. The Ninth Circuit, however, now holds that an administrator's mere rejection of a treating physician's opinion, without evidence that the opinion is unreliable, suffices to prove that the administrator was influenced by an improper motive. The evident assumption is that an administrator who decides to follow the opinion of a consulting physician, rather than the treating physician, *must* be improperly motivated, because no reasonable person would ever decline to follow the seemingly reliable opinion of a treating physician in the absence of improper influence. That assumption is entirely baseless.

First, as we have already discussed, the administrator is almost certain to have much more information about the job

requirements than the treating physician, and may believe, in the exercise of his discretion, that the job can be modified to accommodate the employee's medical condition. *See supra* at 16-17. That an administrator would exercise his discretion in that way is not probative of improper influence; to the contrary, it is exactly what one *expects* of an administrator.

Second, the mere fact that the administrator elects "to rely upon the more favorable conclusions of its own examiner," Pet. App. 14, also is not probative evidence of likely improper influence. The court appears to believe that such an inference is warranted because physicians employed by plans to provide independent evaluations "have a clear incentive to make a finding of not disabled in order to save their employers money and to preserve their own consulting arrangements." *Regula*, 266 F.3d at 1143. But the incentive of such physicians is no more powerful than the incentive of the treating physician to preserve an ongoing patient relationship by giving the employer an opinion that pleases the patient, especially when the physician has no duty to the employer. *See supra* at 18-19.

What the court's concern about the financial incentives potentially affecting an administrator's benefit determination overlooks is that *all* the actors in a benefit determination have a variety of different incentives, not all of which point in favor of granting the benefit. Yet both ERISA and this Court's precedent start with the presumption that professionals with fiduciary obligations live up to those obligations, and other incentives work to prevent deviation from those obligations. *See supra* at 20-22. Because of the subjective and complex nature of a disability benefit determination, all those involved – the administrator, the treating physician, the consulting physician, the insurer or other funding source, the claims administration entity – can all discharge their duties faithfully and honestly and still reach different judgments about whether the benefit should be granted. *See supra* at

15-16. That is why most employers make the ultimate decision an act of discretion.

If an administrator relies on the consulting physician's opinion and such reliance is, for whatever reason, unreasonable on its own terms, then there is an abuse of discretion notwithstanding the effect of any potential conflict. But if such reliance appears reasonable, then the court *must defer* to the administrator's choice to rely on the consulting physician, *unless* there is specific evidence showing that the choice to do so was actually driven by an improper motive. What the Ninth Circuit says is that the administrator's decision to rely on the consulting physician proves, in and of itself, that the decision was improperly motivated. That is perfectly circular and perfectly wrong.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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